

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
BEFORE THE WATER COUNCIL**

RECEIVED

AUG 02 2004

**IN RE: TOURRETTES TRUST
ADMINISTRATIVE ORDER
NO. WD-04-012**

04-16 WC

NOTICE OF APPEAL

This is an appeal of the Department of Environmental Services ("DES") Administrative Order No. WD-04-012 dated July 2, 2004, to the Water Council, filed by Tourrettes Trust, the Owner of a residential lot in Wolfeboro located at 20 Wyman Drive (hereinafter "Owner" and "Property," respectively) by their counsel in this matter, McLane, Graf, Raulerson & Middleton, Professional Association.

1. The Property, a residential lot on the shore of Lake Winnepesaukee, was purchased by the Owner on July 31, 2001 for \$4.2 million. On the Property was the former Louis Wyman house and related buildings, including a boathouse. The house, located immediately adjacent to the shore, the guest house and the boat house were protected by the law in effect at the time as non-conforming uses, even though they were not set back at least 50 feet from the shoreline.

2. As provided by the Wolfeboro Shoreland Protection Ordinance (the controlling authority in this case) and the State Shoreland Protection Act, RSA 483-B, such a nonconforming use "may be repaired, improved, or expanded."

3. The provisions of the State Shoreland Protection statute, RSA 483-B, do "not apply to any applicant whose land is in a municipality that has adopted a Shoreland Protection Ordinance under RSA 674:16, the provisions of which are at least as stringent as similar

provisions in [the State statute]." RSA 483-B:19. Wolfeboro has adopted a Shoreland Protection Ordinance, and is therefore such a municipality, that administers the Shoreland Protection program, rather than the State, within the Town.

4. Between November 2001 and July 2002 the Owner engaged architects and engineers and invested more than \$750,000 in the development of conceptual design, actual construction plans and site preparation for a seven (7) bedroom residence on the Property.

5. Architectural design documents were prepared and full sets of actual construction drawings were developed for the building and for all essential infrastructure and support systems on the Property. Great care was taken to minimize disturbance to the Property outside the building footprint, and to provide full protection of environmental resources on the Property, in the watershed and the lake itself. The site was prepared for construction, roads and walking paths were carefully marked, and systems were designed to preserve and irrigate all the existing vegetation. Elaborate measures were taken to protect the watershed from runoff into the lake. In fact, these measures have been highly commended by DES staff as exceptional. The total cost to date of completed construction including these expenditures is approximately \$6.0 million.

6. Working closely with all regulators, on May 17, July 3 and July 12, 2002, the Owner obtained all the necessary approvals from the Town of Wolfeboro for this project, including a determination that it was in full compliance with the Shoreland Protection requirements.

7. Throughout this project State and local officials have been kept fully informed of the proposed plans for the construction on the Property.

8. After this project was approved, the State after careful review took the position that the local Shoreland Protection Ordinance was controlling (rather than the State statute) and that the permits were valid, and allowed the project construction to continue.

9. It was not until the issuance of this Administrative Order on July 2, 2004, nearly two (2) full years from the date the project obtained its initial approvals, and after the expenditure of more than \$5.25 million on the Property since the date of approval, that the State of New Hampshire has both asserted and exercised purported authority to disturb the approval of shoreland protection requirements under the Wolfeboro Shoreland Protection Ordinance in July 2002.

10. The Owner has not violated the Shoreland Protection Act, RSA 483-B, and the Department lacks authority for the Order (WD-04-012) purporting to require that portions of the structure above a certain height be removed.

11. In fact, preliminary estimates of the cost to alter the structure as the Department has directed after a delay of two (2) years is estimated in the range of \$750,000 to \$1.2 million.

COMMON LAW VESTED RIGHTS

12. In July of 2002 the Owner applied for and received approvals in full compliance with the Wolfeboro Shoreland Protection Ordinance, which in turn satisfied the State Shoreland Protection Act. The Owner has a common law vested right in having the project completed under that law. Piper v. Meredith, 110 N.H. 291 (1970); Milton Dow v. Effingham, 148 N.H. 121 (2002).

13. The Owner has made substantial expenditures and incurred substantial liabilities in preparing for and undertaking construction at the property, in good faith reliance that its

project was permitted under all applicable laws including the Wolfeboro Shoreland Protection requirements ordinance and State environmental laws.

LACHES

14. For nearly two (2) years, DES took no action to disturb the approval issued under the Wolfeboro Shoreland Protection Ordinance. During that time the Owner expended approximately \$5.25 million moving toward completion of construction of the buildings on the Property. The Department is now without authority to change its position, to disturb the approval and to pursue an enforcement action that will require the Owner to incur an additional expense of between \$750,000 and \$1.2 million to destroy and replace what has been constructed on the Property. The Department was fully informed throughout the project of the plans, took the position that the local ordinance governed, and its two year delay in changing its position is unreasonable and prejudicial to the Owner who made substantial expenditures in reliance on the State's original position.

ESTOPPEL

15. For nearly two (2) years, DES took no action to disturb the approval issued under the Wolfeboro Shoreland Protection Ordinance., knowing that Owner would rely thereon. Reasonably relying upon the State's position, and complying with the law, during that two year period the Owner expended approximately \$5.25 million moving toward completion of construction of the buildings on the Property. The Department is now without authority to change its position to the detriment of the Owner, to disturb the approval and to pursue an enforcement action that will require the Owner to incur an additional expense of between \$750,000 and \$1.2 million to destroy and replace what has been constructed on the Property. This would work a substantial injustice on the Owner. The Department was fully informed

throughout the project of the plans and progress, and took the position that the local ordinance governed and the corresponding permits were valid. Its nearly two (2) year delay in changing its position is unreasonable and prejudicial to the Owner who made substantial expenditures in reliance on the State's original position. The harm to the Owner of allowing this State action to proceed far outweighs any effect on the public interest under the relevant statutory authority.

CONSTITUTIONAL CLAIMS

16. To apply a change in the law after the Owner has obtained approval and made substantial progress to completion of building its residence would:

A. Deprive the Owner of due process of law under N.H. CONST. pt. I, arts. 2 and 15 and the 14th Amendment of the U.S. Constitution by pursuing the selective enforcement action. Such arbitrary and discriminatory enforcement of the law can have no proper governmental purpose and violates Owner's due process rights under the State and federal Constitutions.

B. Deprive the Owner of equal protection of the law under N.H. Const. pt 1, arts. 1 and 2 and under the U.S. Constitution's 14th Amendment by failing to govern impartially, failing to apply the law evenhandedly, and treating similarly situated individuals in a different manner. When the State issued the Administrative Order against the Owners, it initiated selective enforcement of a law that does not apply in this case. While not enforcing the law evenhandedly, the State has elected to initiate this "test case" of the Owner's project and in so doing has consciously and intentionally discriminated against the Owner in the exercise of its fundamental property right, without a compelling State interest.

C. Violate the State Constitutional prohibition on retrospective laws, N.H. CONST. pt. I, art. 23 by impairing the Owner's vested substantive rights acquired under existing laws to complete the project in compliance with the Wolfeboro Shoreland Protection Act and corresponding State laws existing in July 2002.

D. Constitute an unconstitutional taking of private property contrary to N.H. Const. pt. 1, art. 2 and the 14th Amendment of the U.S. Constitution by depriving Owner of his fundamental right to possess property without arbitrary or unreasonable restrictions that substantially and onerously impinge on Owner's use of his property and do so for no proper public purpose. The State's attempt to enforce an inapplicable law and its attempt to enforce a law discriminatorily will result in an unconstitutional taking without just compensation of Owner's property rights.

17. The State has failed to act in good faith in this case by reversing its decision to allow the local shoreland protection approval to stand, some twenty-two (22) months after making it, with full knowledge the Owner was relying on the State's earlier decision and incurring substantial expense all during this time period in constructing the residence on the Property.

WHEREFORE, the Owner of Tourrettes Trust requests that the Administrative Order issued on July 2, 2004, be dismissed as exceeding the authority of the Department without lawful basis.

Respectfully submitted,

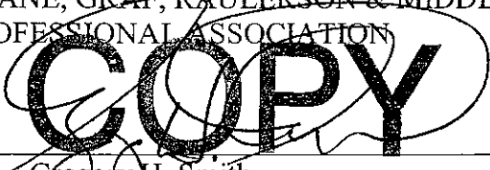
TOURRETTES TRUST

By its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: 8/2/04

By:



Gregory H. Smith
Bicentennial Square
Fifteen North Main Street
Concord, NH 03301
Telephone (603) 226-0400

Certificate of Service

I hereby certify that on the 2nd day of August, 2004, I caused to be hand delivered an original and twenty (20) copies of the foregoing Notice of Appeal Of Administrative Order No. WD-04-012 to Michael Sclafani, Clerk of the Water Council and to Michael P. Nolin, Commissioner, and Harry T. Stewart, Director.



Gregory H. Smith



The State of New Hampshire
Department of Environmental Services

FILE COPY



Michael P. Nolin
Commissioner

Tourettes Trust
c/o Ian Ferguson
333 Lee Street
Brookline, MA 02445

Re: Wetlands File No. 2001-00626
Lake Winnepesaukee, Wolfeboro, NH

ADMINISTRATIVE ORDER
No. WD 04-012

July 2, 2004

A. INTRODUCTION

This Administrative Order is issued by the Department of Environmental Services, Water Division to Tourettes Trust pursuant to RSA 483-B:11. This Administrative Order is effective upon issuance.

B. PARTIES

1. The Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03301.
2. Tourettes Trust is a real estate trust established in the Commonwealth of Massachusetts having a mailing address of 333 Lee Street, Brookline, MA 02445.

C. STATEMENTS OF FACTS AND LAW

1. Pursuant to RSA 483-B, the Comprehensive Shoreland Protection Act ("CSPA"), the Department of Environmental Services ("DES") regulates development activities in the protected shoreland zone established under the CSPA. Pursuant to RSA 483-B:17, the Commissioner of DES has adopted NH Administrative Rules Env-Ws 1400 to implement this program.
2. RSA 483-B:18, I provides that failure, misrepresentation, or refusal to comply with RSA 483-B or rules adopted under [that] chapter shall be deemed a violation under RSA 483-B and subject to criminal and civil penalties.
3. Tourettes Trust is the owner of land located at Wolfeboro tax map 227, lot 39 ("the Property").
4. On September 20, 2002, DES personnel inspected the Property and found the following:
 - (a) An existing nonconforming dwelling had been completely removed and no construction of new structures had begun.
 - (b) The footprint of the new dwelling exceeded the development standard set forth in RSA 483-B:11 by expanding the footprint within the protected shoreland.

5. On September 20, 2002, DES personnel explained the need for a variance or waiver for continued construction. Jim Rines of White Mountain Survey Company, Inc. indicated that he would submit the applicable waiver paperwork.
6. On September 15, 2003, DES received a complaint about possible violation of RSA 483-B at the Property. A follow up field inspection on October 1, 2003 found a two-to three-story steel superstructure erected on the site.
7. NH RSA 483-B:11, I provides that "nonconforming structures, erected prior to July 1, 1994, located within the protected shoreland may be repaired, renovated, or replaced in kind using modern technologies, provided the result is a functionally equivalent use. Such repair or replacement may alter the interior design or existing foundation, but no expansion of the existing footprint or outside dimensions shall be permitted."
8. NH RSA 483-B:11, II provides that "[w]hen reviewing requests for the redevelopment of sites that contain nonconforming structures erected prior to July 1, 1994, the commissioner shall review proposals which are more nearly conforming than the existing structures, and may waive some of the standards specified in RSA 483-B:9, so long as there is at least the same degree of protection to the public waters."
9. DES has no record of receiving a request for, or granting, a waiver for the work in question.

D. DETERMINATION OF VIOLATIONS

1. Ian Ferguson & Tourrettes Trust have violated RSA 483-B:11 by expanding the outside dimensions of a nonconforming dwelling within the protected shoreland without a waiver from DES.

E. ORDER

Based on the above findings, DES hereby orders Tourrettes Trust as follows:

1. Immediately cease all construction activities on the Property related to the construction of those portions of the dwelling between the reference line and the primary building setback line.
2. Submit a restoration plan to DES for removal of all portions of the structure, located between the reference line and the primary building line, which exceed the height of the preexisting single-story structure within 30 days of this order.
3. Send correspondence, data, reports, and other submissions made in connection with this Administrative Order, other than appeals, to DES as follows:

Darlene Forst
DES Water Division
29 Hazen Drive
PO Box 95
Concord, NH 03302-0095
Fax: (603) 271-6588
email: dforst@des.state.nh.us

F. APPEAL

Any person aggrieved by this Order may appeal the Order to the New Hampshire Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this Order. Copies of the rule are available from the DES Public Information Center at (603) 271-2975 or at <http://www.des.state.nh.us/desadmin.htm>. Filing an appeal or motion for reconsideration of the Order will not automatically relieve you of your obligation to comply with the Order.

G. OTHER PROVISIONS

Please note that RSA 483-B provides for administrative fines, civil penalties, and criminal penalties for the violations noted in this Order, as well as for failing to comply with the Order itself. Ian Ferguson and Tourrettes Trust remains obligated to comply with all applicable requirements. DES will continue to monitor Tourrettes Trust's compliance with applicable requirements and will take appropriate action if additional violations are discovered.

This Order is being recorded in the Carroll County Registry of Deeds so as to run with the land.

COPY
Harry A. Stewart, P.E., Director
Water Division

COPY
Michael P. Nolin Ass't. Comm.
Michael P. Nolin, Commissioner

Certified Mail/RRR: 70023150000154111258

cc: Gretchen Hamel, Administrator, DES Legal Unit
Public Information Officer, DES Public Information Center
Jennifer Patterson, Senior Asst. Attorney General, EPB, NHDOJ
Carroll County Registry of Deeds
Wolfeboro Selectmen
Wolfeboro Conservation Commission

MAILED
7-6-04 NLP